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IN THE

Supreme Court of the United States

No. ———

October Term, 1949.

S. H. STEVENS and E. L. STEVENS, Co-partners Doing Business Under the Firm Name and Style of SLEET SHAVER MFG. CO., Petitioners,

vs.

FEDERAL CARTRIDGE CORPORATION, a Corporation Doing Business as TWIN CITIES ORDNANCE PLANT, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by the petitioners above named for this Court's Writ of Certiorari to review a judgment of the Supreme Court of Minnesota rendered in this cause on August 3, 1949, pursuant to a per curiam opinion filed June 24, 1949.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Minnesota reported in —— Minn. ——, 38 N. W. (2d) 154, was issued on the authority of a former opinion in the same case. The controlling opinion is reported in 226 Minn. 148, 32 N. W. (2d) 312.

JURISDICTION

The jurisdiction of this Court to review the questions herein presented is invoked under Title 28, United States Code, Sec. 1257 (3).

The judgment of the Supreme Court of Minnesota was entered on August 3, 1949, and became final on that date. The time to present this petition has been extended to Dec. 1, 1949, by order of this court dated Oct. 28, 1949.

The Court below held that the Contract Settlement Act of 1944, 41 U. S. C. §§ 101 to 125, barred a subcontractor from suing his prime contractor in a court of law to recover the reasonable value of services rendered under a terminated war contract, before pursuing an administrative remedy allegedly afforded by such Act, by filing a formal claim with the prime contractor on forms prescribed therefor.

The applicability and construction of the Contract Settlement Act of 1944 (41 U. S. C. §§ 101-125) was raised in every stage of the proceedings below. The court below passed upon the question and specifically held that an attempt to settle contract claims under the Contract Settlement Act of 1944, and regulations issued thereunder, was a condition precedent to the bringing of an action in a court of law, both for prime contractors and for subcontractors.

STATEMENT

Respondent was engaged by the United States Government during the period 1941-1945 as a prime contractor with the War Department to operate the Twin Cities Ordnance Plant, a government arsenal, to manufacture ammunition on a cost-plus-fixed-fee arrangement (R. p. 4, f. 2).

On or about August 28, 1944, petitioners and respondents made a written contract whereby petitioners agreed to repair 200,000 ammunition boxes to be supplied by respondent, on a fixed price basis (R. p. 5, f. 3).

Although there is no claim by respondent that the contract contained any provision authorizing its termination before completion, respondent, on October 18, 1944, gave formal notice of termination (R. p. 8, f. 3 to p. 9, f. 2). Respondent had then delivered 186,062 boxes for repair but only 93,080 had been accepted as repaired (R. p. 10).

Petitioners sued in the District Court of Hennepin County, Minnesota, to recover $41,769.96 as the reasonable value of services rendered and materials supplied in the repair of ammunition boxes (R. pp. 1-3). Respondent admitted a liability of $2,965.47 (R. p. 11, f. 1) but alleged that it had

> "requested of plaintiff that it prepare and file its claim with defendant for such claimed additional benefits on the forms promulgated for that purpose, and as provided by the joint termination regulation promulgated pursuant to the Contract Termination (Settlement) Act, but the plaintiff has refused and neglected to prepare and submit its claim so prepared, as that act provides * * *" (R. p. 11, f. 3), and
>
> "That by reason of the failure to comply with the Contract Settlement Act * * *, and the rules and regulations duly promulgated thereunder, plaintiff

has not exhausted the administrative remedies provided for the submission and adjustment of said claim and until that action is taken by plaintiff, the Court has not jurisdiction of the subject matter of this action" (R. p. 12, f. 1).

(Reference to Pub. Law 657, Chap. 864, 79th Cong. pleaded by respondent, is deleted, as this defense was subsequently withdrawn by respondent.)

To the defense so pleaded, petitioners demurred (R. p. 13, f. 1). The trial court overruled petitioners' demurrer, but certified that the question was important and doubtful (R. p. 16, f. 3 to p. 17, f. 2). Petitioners appealed to the Supreme Court of Minnesota (R. p. 23), which affirmed the order of the trial court in an opinion filed April 23, 1948, reported in 226 Minn. 148, 32 N. W. (3d) 312 (R. pp. 24-37).

Respondent moved for judgment of dismissal on the pleadings (R. p. 38, f. 38) which was granted (R. p. 39, f. 39). On appeal (R. p. 41, f. 41) the judgment was affirmed by the Supreme Court of Minnesota, by the judgment sought to be reviewed (R. p. 44, f. 45).

QUESTIONS PRESENTED

1. Does the Contract Settlement Act of 1944 (41 U. S. C. §§ 101-125) bar a subcontractor from suing his prime contractor in a court of law under a terminated war contract which does not contain a termination clause, before filing a claim with the prime contractor on a form prescribed by the regulations issued pursuant to such Act?

2. Does the Contract Settlement Act of 1944 as construed by the Minnesota Supreme Court, deprive petitioners of their property without due process of law?

STATUTES INVOLVED

The pertinent provisions of the Contract Settlement Act of 1944 (41 U. S. C. §§ 101-125) are set out in the Appendix (pp. 12 to 36).

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of Minnesota erred:

1. In holding that the Contract Settlement Act of 1944 barred petitioners from maintaining an action in a court of law against its prime contractor without having first filed a formal claim with respondent on forms prescribed under said Act.

2. In holding that said Act gave Petitioner an administrative remedy.

3. In failing to give a construction to said Act which would avoid any question of constitutionality.

4. In affirming the judgment of the trial court.

REASONS FOR ALLOWANCE OF WRIT

The question decided has not been passed upon by this Court, nor has the statute been construed by this Court or any Circuit Court of Appeals. The decision is in conflict with the construction of the Act placed upon it by the Appeal Board established pursuant to the Act. See:

Precision Metal & Machine Co. v. War Dept. and *Kal Machine Works, Inc. v. War Dept.*, 3 Contract Cases Federal 1001.

cf. *Precison Metal & Machine Co. v. U. S.*, 68 F. Supp. 436, 107 Ct. Cl. 202.

In these cases, the Appeal Board, after holding that a subcontractor had no right of appeal under Sec. 13

of the Act where the contracting agency had not undertaken to settle with him directly, said:

> "This does not mean that the Act has curtailed the common law remedies of a subcontractor where a contracting agency has refused in its discretion to assume responsibility for direct settlement under Section 7 (d). *He may sue the war contractor liable to him in court* * * *" (Italics added).

The decision is in conflict with decisions of this Court construing other comparable statutes.

See:

Scripps Howard Radio v. Federal Communication Commission, 316 U. S. 4, 17, 62 S. Ct. 875, 883, 86 L. Ed. 1229.

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752, 67 S. Ct. 1493, 91 L. Ed. 1796.

In the latter case, the Court held that a subcontractor had a right to sue his prime contractor in a court of law to recover sums withheld as excess profits on direction of the Secretary of War, made pursuant to the Renegotiation Act (50 U. S. C. A. App. 1191), notwithstanding such Act vested exclusive jurisdiction in the Tax Court to obtain a redetermination of excess profits, where Congress had remained silent as to the jurisdiction of the Courts under such circumstances.

In the former case, this Court said:

> "The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions."

Notwithstanding the caution so urged by this Court, the Minnesota Court in the case at bar, though conceding that the Act and Regulation was silent as to any obligation of a subcontractor to attempt to negotiate a

settlement with his prime contractor and as to any express withdrawal of jurisdiction from the Courts, pursued the "mirage". By "interpolating" the Court's "notions of policy in the interstices of legislative provisions" the Minnesota Court held that Congress, by implication, intended to withdraw from the courts jurisdiction to determine disputes between a subcontractor and a prime contractor under terminated war contracts until the subcontractor had pursued the "administrative" remedy of attempting a negotiated settlement with his prime contractor.

Where Congress has intended to withdraw jurisdiction from Courts, "it knew how to use apt words".

Scripps Howard Radio v. Federal Communication Commission, 316 U. S. 4, 17, 62 S. Ct. 875, 883, 86 L. Ed. 1229.

Examples of other legislation in which Congress has found apt words to withdraw jurisdiction from the courts are set out in the footnotes.[1]

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[1](a) Section 204 (d) of the Emergency Price Control Act of 1946, as amended (50 U. S. C. A. App., Sec. 901, et seq.):

"Except as provided in this section, no court, Federal, State or Territorial, shall have jurisdiction or power to consider the validity of any * * * regulation, order, or price schedule, or to stay, restrain, impair, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

(b) Sec. 3772 (a) (1) Internal Revenue Code (26 U. S. C. A. 3772):

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

Because of the broad definition of "subcontractor"[2] in the Act (41 U. S. C., Sec. 103 (b)) to include subcontractors of subcontractors, the decision at bar is far reaching. It affects substantially every contract made during the war involving the furnishing of work or material required for the performance of any prime or subcontract. The decision undoubtedly affects millions of contracts involving expenditures of billions of dollars.

Even a farmer suing to recover the price of an animal sold a commission merchant is a "subcontractor" if the animal was required by a packer, or if its hide was required by a tanner, to fulfill a war contract subsequently terminated. By the decision at bar, the Courts would be deprived of jurisdiction over the action unless the farmer had made a claim to the commission merchant on forms prescribed by the Joint Termination Regulations.

Because of the far reaching effect, it is submitted that Congress deliberately remained silent on this subject.

Statutes should be construed, if possible, to avoid unconstitutionality. Courts should not attribute to Congress an intent to defy the Fifth Amendment or "even to come so near to doing so as to raise a serious question of constitutional law".

Anniston Mfg. Co. v. Davis, 301 U. S. 337, 351, 57 S. Ct. 816, 81 L. Ed. 1143.

Federal Trade Commission v. Am. Tob. Co., 264 U. S. 298, 307, 44 S. Ct. 336, 68 L. Ed. 696, 701, 32 A. L. R. 786.

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[2]"The term 'subcontract' means any contract, agreement, or purchase order heretofore or hereafter entered into to perform any work, or to make or furnish any material to the extent that such work or material is required for the performance of any one or more prime contracts or of any one or more other subcontracts; and the term 'subcontractor' means any holder of one or more subcontracts."

As construed by the Minnesota Court, the Act deprives Petitioner of his property without due process of law, contrary to the Fifth Amendment.

It is recognized that the requirement of recourse to administrative procedure does not establish invalidity if the administrative procedure affords an opportunity for a full and fair hearing, and determination of all questions of fact and adequately provides for the protection of the legal rights of the claimant.

Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816, 81 L. Ed. 1143.

But the Contract Settlement Act as construed by the Minnesota Court does not give *any* administrative remedy, nor does it adequately protect Petitioners' rights.

Sec. 107 (d) of the Act provides that the contracting agency may settle directly termination claims of subcontractors to the extent it deems necessary or desirable, with the *consent* of the subcontractor.

Only in the event of assumption by the contracting agency of an obligation to make direct settlement, can a subcontractor have the benefit of the appeal procedure prescribed by Sec. 113 of the Act, as a matter of right.

Precision Metal & Machine Co. v. War Department.
Kal Machine Works, Inc. v. War Department, 3 Contract Cases Federal 1001.

Sec. 113 (f) of the Act also permits the claim to be submitted to the Appeal Board, or to a contracting agency for arbitration, but only if the prime contractor and the subcontractor consent.

The Act makes no provision for a hearing, taking of evidence, or obtaining a determination of either fact or law, as between the prime and subcontractor if the latter presents a formal claim to the former.

Accordingly, until the prime contractor chooses to allow or deny the claim, a subcontractor is without any remedy.

The contracting agency is under no obligation to assume payment of the subcontractor's claim. Since the subcontractor is deprived of the rights of garnishment or attachment incident to a suit of law, the requirement of exhausting the "remedy" of an attempt to negotiate a settlement before suit may result in irretrievable loss should other creditors intervene or collection become impossible due to the delay.

The framers of the Joint Termination Regulations (9 F. R. pp. 13316 to 13452) issued pursuant to the Act recognized that a judgment in a suit by a subcontractor against his prime contractor was a binding "settlement" in determining the obligation of the Government to reimburse the prime contractor.

> "625.1. Recognition of judgments of subcontractors against war contractors. (1) Where a subcontractor obtains a final judgment against a war contractor on a termination claim, the contracting officer should treat the amount of the judgment as the cost of settling the claim of the subcontractor, to the extent he deems it properly allocable to the prime contract, if—(a) the subcontract does not contain unusual termination provisions unreasonably increasing the common law rights of the subcontractor, and (b) the war contractor made reasonable efforts to settle with the subcontractor, and (c) the war contractor gave prompt notice of the suit to the contracting officer and offered the Government control of the defense, and diligently defended the suit, or assisted the Government to defend it."

The Congressional debates on the Act show that there was no intent to withdraw jurisdiction from the Courts in these circumstances.

See: pp. 3996-3997, Congressional Record—Senate—May 3, 1944.

"Mr. George: * * * A subcontractor who has not been recognized by the Government has no right to appeal to the Appeal Board. He has a right to go to a court. If the Government recognizes him, he has an absolute right to appeal to the Appeal Board or go to court at his election.

Mr. Kilgore: Is there any way the subcontractor can force the United States to recognize him in the event he feels that the prime contractor is not treating him fairly?

Mr. George: He can go into court.

Mr. Kilgore: He can go into court only against the prime contractor?

Mr. George: Yes."

CONCLUSION

WHEREFORE, Petitioner prays that this petition for a writ of certiorari issue to the Supreme Court of Minesota for the purpose of reviewing the question heretofore specified.

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APPENDIX

CONTRACT SETTLEMENT ACT OF 1944
CHAPTER 358—PUBLIC LAW 395
[S. 1718]

An Act to provide for the settlement of claims arising from terminated war contracts, and for other purposes.

Be it enacted by the Senate and House of Represenatives of the United States of America in Congress assembled, That:

OBJECTIVES OF THE ACT

Section 1. The Congress hereby declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud.

SURVEILLANCE BY CONGRESS

Sec. 2 "omitted".

DEFINITIONS

Sec. 3. As used in this Act—

(a) The term "prime contract" means any contract, agreement, or purchase order heretofore or hereafter entered into by a contracting agency and connected with or related to the prosecution of the war; and the term "prime contractor" means any holder of one or more prime contracts.

(b) The term "subcontract" means any contract, agreement, or purchase order heretofore or hereafter entered into to perform any work, or to make or furnish any material to the extent that such work or material is required for the performance of any one or more prime contracts or of any one or more other subcontracts; and the term "subcontractor" means any holder of one or more subcontracts.

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

(d) The terms "termination", "terminate", and "terminated" refer to the termination or cancellation, in whole or in part, of work under a prime contract for the convenience or at the option of the Government (except for default of the prime contractor) or of work under a subcontract for any reason except the default of the subcontractor.

(e) The term "material" includes any article, commodity, machinery, equipment, accessory, part, component, assembly, work in process, maintenance, repair, and operating supplies, and any product of any kind.

(f) The term "government agency" means any executive department of the Government, or any administrative unit or subdivision thereof, any independent agency or any corporation owned or controlled by the United States in the executive branch of the Government, and includes any contracting agency.

(g) The term "contracting agency" means any Government agency which has been or hereafter may be authorized to make contracts pursuant to section 201 of the First War Powers Act, 1941, and includes the Reconstruction Finance Corporation and any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, the Smaller War Plants Corporation, and the War Production Board.

(h) The term "termination claim" means any claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this Act authorize to be asserted and settled in connection with any termination settlement.

(i) The term "interim financing" includes advance payments, partial payments, loans, discounts, advances, and commitments in connection therewith, and guaranties of loans, discounts, advances, and commitments in connection therewith and any other type of financing made in contemplation of or related to termination of war contracts.

(j) The term "Director" means the Director of Contract Settlement.

(k) The term "person" means any individual, corporation partnership, firm, association, trust, estate, or other entity.

(l) The term "termination inventory" means any materials (including a proper part of any common materials), properly allocable to the terminated portion of a war contract, except any machinery or equipment subject to a separate contract specifically governing the use or disposition thereof.

(m) The term "final and conclusive", as applied to any settlement, finding, or decision, means that such settlement, finding, or decision shall not be reopened, annulled, modified, set aside, or disregarded by any officer, employee, or agent of the United States or in any suit, action, or proceeding except as provided in this Act.

DIRECTOR OF CONTRACT SETTLEMENT

Sec. 4. (a) There is hereby established the Office of Contract Settlement which shall be headed by the Director of Contract Settlement. The Director shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $12,000 per year, and shall serve for a term of two years.

(b) In order to insure uniform and efficient administration of the provisions of this Act, the Director, subject to such provisions, by general orders or general regulations—

(1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this Act; and

(2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this Act.

(c) The exercise of any authority or discretion and the performance of any duty or function, conferred or imposed on any Government agency by this Act, shall be subject to such orders and regulations prescribed by the Director pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Director expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Director. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Director as it deems necessary or desirable to carry out the provisions of this Act.

(d) "omitted".

(e) "omitted"

CONTRACT SETTLEMENT ADVISORY BOARD

Sec. 5. There is hereby created a Contract Settlement Advisory Board, with which the Director shall advise and consult. The Board shall be composed of the Director, who shall act as its Chairman, and of the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the Foreign Economic Administration, the chairman of the board of directors of the Reconstruction Finance Corporation, the Chairman of the War Production Board, the chairman of the board of directors of the Smaller War Plants Corporation, and the Attorney General or any alternate or representative designated by any of them. The Director shall request other Government agencies to participate in the deliberations of the Board whenever matters specially affecting them are under consideration.

Sec. 6. (a) It is the policy of the Government, and it shall be the responsibility of the contracting agencies and the Director, to provide war contractors with speedy and fair compensation for the termination of any war contract, in accordance with and subject to the provisions of this Act, giving priority to contractors whose facilities are privately owned or privately operated. Such fair compensation for the termination of subcontracts shall be based on the same principles as compensation for the termination of prime contracts.

(b) Each contracting agency shall establish methods and standards, suitable to the conditions of various war contractors, for determining fair compensation for the termination of war contracts on the basis of actual, standard, average, or estimated costs, or of a percentage of the contract price based on the estimated percentage of completion of work under the terminated contract, or on any other equitable basis, as it deems appropriate. To the extent that such methods and standards require accounting, they shall be adapted, so far as practicable, to the accounting systems used by war contractors, if consistent with recognized commercial accounting practice.

(c) Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods. Where any such settlement is made by agreement, the settlement shall be final and conclusive, except (1) to the extent otherwise agreed in the settlement; (2) for fraud; (3) upon renegotiation to eliminate excessive profits under the Renegotiation Act, unless exempt or exempted under that Act; or (4) by mutual agreement before or after payment. Where any such settlement is made by determination without agreement, it shall likewise be final and conclusive, subject to the same exceptions as if made by agreement, unless the war contractor appeals or brings suit in accordance with section 13 of this Act: *Provided,* That no settlement agreement hereunder involving payment to a war contractor of an amount in excess of $50,000 (or such lesser amount as the Director may from time to time determine) shall become binding upon the Government until the agreement has been reviewed and approved by a settlement review board of three or more members established by the contracting agency in the bureau, division, regional or district office, or other unit of the contracting agency authorized to make such settlement, or in the event of disapproval by the settlement review board, unless approved by the head of such bureau, division, regional or district office, or other unit. Failure of the settlement review board to act upon any settlement within thirty days after its submission to the board shall operate as approval by the board. The sole function of settlement review boards shall be to determine the over-all reasonableness of proposed settlement agreements from the point of view of protecting the interests of the Government. In determining, for purposes of this subsection, whether review of any settlement agreement is required because of the amounts involved, no deduction shall be made on account of credits for property chargeable to the Government or for advance or partial payments, but amounts payable under such settlement agreement for completed articles or

work at the contract price and for the discharge of the termination claims of subcontractors shall be deducted.

(d) Except as hereinafter provided, the methods and standards established under subsection (b) of this section for determining fair compensation for termination claims which are not settled by agreement shall be designed to compensate the war contractor fairly for the termination of the war contract, taking into account—

(1) the direct and indirect manufacturing, selling and distribution, administrative and other costs and expenses incurred by the war contractor which are reasonably necessary for the performance of the war contract and properly allocable to the terminated portion thereof under recognized commercial accounting practices; and

(2) reasonable costs and expenses of settling termination claims of subcontractors related to the terminated portion of the war contract; and

(3) reasonable accounting, legal, clerical, and other costs and expenses incident to termination and settlement of the terminated war contract; and

(4) reasonable costs and expenses of removing, preserving, storing and disposing of termination inventories; and

(5) such allowance for profit on the preparations made and work done for the terminated portion of the war contract as is reasonable under the circumstances; and

(6) interest on the termination claim in accordance with subsection (f) of this section; and

(7) the contract price and all amounts otherwise paid or payable under the contract.

The following shall not be included as elements of cost:

(i) Losses on other contracts, or from sales or exchanges of capital assets, fees and other expenses in connection with reorganization or recapitalization, an-

titrust or Federal income-tax litigation, or prosecution of Federal income-tax claims or other claims against the Government (except as provided in paragraph (3) above); losses on investments; provisions for contingencies; and premiums on life insurance where the contractor is the beneficiary.

(ii) The expense of conversion of the contractor's facilities to uses other than the performance of the contract.

(iii) Expenses due to the negligence or willful failure of the contractor to discontinue with reasonable promptness the incurring of expenses after the effective date of the termination notice.

(iv) Costs incurred in respect to facilities, materials, or services purchased or work done in excess of the reasonable quantitative requirements of the entire contract.

The failure specifically to mention in this subsection any item of cost is not intended to imply that it should be allowed or disallowed. The Director may interpret the provisions of this subsection (d) and may provide for the inclusion or exclusion of other costs in accordance with recognized commercial accounting practice.

Where the small size of claims or the nature of production or performance or other factors make it impracticable to apply the principles stated in this subsection (d) to any class of settlements which are subject to this subsection (d), the contracting agencies may establish alternative methods and standards for determining fair compensation for that class of termination claims. The aggregate amount of compensation allowed in accordance with this subsection (excluding amounts allowed under paragraphs (3) and (4) above) shall not exceed the total contract price reduced by the amount of payments otherwise made or to be made under the contract.

(e) In order to carry out the objectives of this Act, termination claims shall be settled by agreement to the maximum extent feasible and the methods and standards established under subsection (b) of this section shall be designed to facilitate such settlements. To the

extent that he deems it practicable to do so without impeding expeditious settlements, the Director shall require the contracting agencies to take into account the factors enumerated in subsection (d) above in establishing methods and standards for determining fair compensation in the settlement of termination claims by agreement.

(f) Each contracting agency shall allow and pay interest on the amount due and unpaid from time to time on any termination claim under a prime contract at the rate of 2½ per centum per annum for the period beginning thirty days after the date fixed for termination and ending with the date of final payment, except that (1) if the prime contractor unreasonably delays the settlement of his claim, interest shall not accrue for the period of such delay, (2) if interest for the period after termination on any advance payment or loan, made or guaranteed by the Government, has been waived for the benefit of the contractor, the amount of the interest so waived allocable to the terminated contract or the terminated part of the contract shall be deducted from the interest otherwise payable hereunder, and (3) if after delivery of findings by a contracting agency, the contractor appeals or sues as provided in section 13, interest shall not accrue after the thirtieth day following the delivery of the findings on any amount allowed by such findings, unless such amount is increased upon such appeal or suit. In approving, ratifying, authorizing, or making termination settlements with subcontractors, each contracting agency shall allow interest on the termination claim of the subcontractor on the same basis and subject to the same conditions as are applicable to a prime contractor.

(g) Where any war contract does not provide for or provides against such fair compensation for its termination, the contracting agency, either before or after its termination, shall amend such war contract by agreement with the war contractor, or shall authorize, approve, or ratify an amendment of such war contract by the parties thereto, to provide for such fair compensation.

Sec. 7. (a) Where, in connection with the settlement of any termination claim by a contracting agency, any war contractor makes settlements of the termination claims of his subcontractors, the contracting agency shall limit or omit its review of such settlements with subcontractors to the maximum extent compatible with the public interest. Any contracting agency (1) may approve, ratify, or authorize such settlements with subcontractors upon such evidence, terms, and conditions as it deems proper; (2) shall vary the scope and intensity of its review of such settlements according to the reliability of the war contractor, the size, number, and complexity of such claims, and other relevant factors; and (3) shall authorize war contractors to make such settlements with subcontractors without review by the contracting agency, whenever the reliability of the war contractor, the amount or nature of the claims, or other reasons appear to the contracting agency to justify such action. Any such settlement of a subcontract approved, ratified, or authorized by a contracting agency shall be final and conclusive as to the amount due to the same extent as a settlement under subsection (c) of section 6 of this Act, and no war contractor shall be liable to the United States on account of any amounts paid thereon except for his own fraud.

(b) Whenever any contracting agency is satisfied of the inability of a war contractor to meet his obligations it shall exercise supervision or control over payments to the war contractor on account of termination claims of subcontractors of such war contractor to such extent and in such manner as it deems necessary or desirable for the purpose of assuring the receipt of the benefit of such payments by the subcontractors.

(c) The Director shall prescribe policies and methods for the settlement as a group, or otherwise, by any contracting agency of some or all of the termination claims of a war contractor under war contracts with one or more (1) bureaus or divisions within a contracting agency, (2) contracting agencies, or (3) prime contractors and subcontractors, to the extent he deems such action necessary or desirable for expeditious and equitable settlement of such claims. After consulting

with the contracting agencies concerned, the Director may provide for assigning any war contractor to a contracing agency for such settlement, and such agency shall have authority to settle, on behalf of any other contracting agency, some or all of the termination claims of such war contractor.

(d) Any contracting agency may settle directly termination claims of subcontractors to the extent that it deems such action necessary or desirable for the expeditious and equitable settlement of such claims. In making such termination settlements any contracting agency may discharge the claim of the subcontractor by payment or may purchase such claim, and may agree to assume, or indemnify the subcontractor against, any claims by any person in connection with such claim or the termination settlement. Any contracting agency undertaking to settle the termination claim of any subcontractor shall deliver to the subcontractor and the war contractor liable to him written notice stating its acceptance of responsibility for settling his claim and the conditions applicable thereto, which may include the release, or assignment to the contracting agency, of his claim against the war contractor liable to him; upon consent thereto by the subcontractor, the Government shall become liable for the settlement of his claims upon the conditions specified in the notice.

(e) Any contracting agency may make settlements with subcontractors in accordance with any of the provisions of this Act without regard to any limitation on the amount payable by the Government to the prime contractor.

(f) If any contracting agency determines that in the circumstances of a particular case equity and good conscience require fair compensation for the termination of a war contract to be paid to a subcontractor who has been deprived of and cannot otherwise reasonably secure such fair compensation, the contracting agency concerned may pay such compensation to him although such compensation already has been included and paid as part of a settlement with another war contractor.

INTERIM FINANCING

Sec. 8 "omitted".
Sec. 9 "omitted".
Sec. 10 "omitted".

ADVANCE NOTICE

Sec. 11. (a) In order to facilitate the efficient use of materials, man-power, and facilities for war and civilian purposes, each contracting agency—

(1) shall provide its prime contractors with notice of termination of their prime contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security without permitting unneeded production or performance;

(2) shall establish procedures whereby prime contractors shall provide affected subcontractors with immediate notice of termination; and

(3) shall permit the continuation of some or all of the work under a terminated prime contract whenever the agency deems that such continuation will benefit the Government or is necessary to avoid substantial injury to the plant or property.

(b) Whenever a contracting agency hereafter directs a prime contractor to cease or suspend all or a substantial part of the work under a prime contract, without terminating the contract, then, unless the contract provides otherwise, (1) the contracting agency shall compensate the contractor for reasonable costs and expenses resulting from such cessation or suspension, and (2) if the cessation or suspension extends for thirty days or more, the contractor may elect to treat it as a termination by delivering written notice of his election so to do to the contracting agency, at any time before the contracting agency directs the prime contractor to resume work under the contract.

(c) The Director shall have no authority under this Act to regulate or control the classes of contracts to be terminated by the contracting agencies.

REMOVAL AND STORAGE OF MATERIALS
Sec. 12 "omitted'.'

APPEAL

Sec. 13. (a) Whenever the contracting agency responsible for settling any termination claim has not settled the claim by agreement or has so settled only a part of the claim, (1) the contracting agency at any time may determine the amount due on such claim or such unsettled part, and prepare written findings indicating the basis of the determination, and deliver a copy of such findings to the war contractor, or (2) if the termination claim has been submitted in the manner and substantially the form prescribed under this Act, the contracting agency, upon written demand by the war contractor for such findings, shall determine the amount due on the claim or unsettled part and prepare and deliver such findings to the war contractor within ninety days after the receipt by the agency of such demand. In preparing such findings, the contracting agency may require the war contractor to furnish such information and to submit to such audits as may be reasonably necessary for that purpose. Within thirty days after the delivery of any such findings, the contracting agency shall pay to the war contractor at least 90 per centum of the amount thereby determined to be due, after deducting the amount of any outstanding interim financing applicable thereto.

(b) Whenever any war contractor is aggrieved by the findings of a contracting agency on his claim or part thereof or by its failure to make such findings in accordance with subsection (a) of this section, he may, at his election—

(1) appeal to the Appeal Board in accordance with subsection (d) of this section; or

(2) bring suit against the United States for such claim or such part thereof, in the Court of Claims or in a United States district court, in accordance with subsection (20) of section 24 of the Judicial Code (28 U. S. C. 41 (20)), except that,

if the contracting agency is the Reconstruction Finance Corporation, or any corporation organized pursuant to the Reconstruction Finance Corporation Act (47 Stat. 5), as amended, or any corporation owned or controlled by the United States, the suit shall be brought against such corporation in any court of competent jurisdiction in accordance with existing law.

(c) Any proceeding under subsection (b) of this section shall be governed by the following conditions:

(1) When any contracting agency provides a procedure within the agency for protest against such findings or for other appeal therefrom by the war contractor, the war contractor, before proceeding under subsection (b) of this section, (i) in his discretion may resort to such procedure within the time specified in this contract, or, if no time is specified, within thirty days after the delivery to him of the findings; and (ii) shall resort to such procedure for protest or other appeal to the extent required by the Director, but failure of the contracting agency to act on any such required protest or appeal within thirty days shall operate as a refusal by the agency to modify its findings. Any revision of the findings by the contracting agency, upon protest or appeal within the agency, shall be treated as the findings of the agency for the purpose of appeal or suit under subsection (b) of this section. Notwithstanding any contrary provision in any war contract, no war contractor shall be required to protest or appeal from such findings within the contracting agency except in accordance with this paragraph.

(2) A war contractor may initiate proceedings in accordance with subsection (b) of this section (i) within ninety days after delivery to him of the findings by the contracting agency, or (ii) in case of protests or appeal within the agency, within ninety days after the determination of such protest or appeal, or (iii) in case of failure to deliver such findings, within one year after his demand therefor. If he does not initiate such proceedings within the time specified, he shall be precluded thereafter from initiating any proceedings in ac-

cordance with subsection (b) of this section, and the findings of the contracting agency shall be final and conclusive, or if no findings were made, he shall be deemed to have waived such termination claim.

(3) Notwithstanding any contrary provision in any war contract, the Appeal Board or court shall not be bound by the findings of the contracting agency, but shall treat such findings as prima facie correct, and the burden shall be on the war contractor to establish that the amount due on his claim or part thereof exceeds the amount allowed by the findings of the contracting agency. Whenever the Appeal Board or court finds that the war contractor failed to negotiate in good faith with the contracting agency for the settlement of his claim or part thereof before appeal or suit thereon, or failed to furnish to the agency any information reasonably requested by it regarding his termination claim or part thereof, or failed to prosecute diligently any protest or appeal required to be taken under subsection (c) (1) (ii) of this section, the Appeal Board or court (i) may refuse to receive in evidence any information not submitted to the contracting agency; (ii) may deny interest on the claim or part thereof for such period as it deems proper; or (iii) may remand the case to the contracting agency for further proceedings upon such terms as the Appeal Board or court may prescribe. Unless the case is remanded, the Appeal Board or court shall enter the appropriate award or judgment on the basis of the law and facts, and may increase or decrease the amount allowed by the findings of the contracting agency.

(4) Any such proceedings shall not affect the authority of the contracting agency concerned to make a settlement of the termination claim, or any part thereof, by agreement with the war contractor at any time before such proceedings are concluded.

(d) (1) The Director shall appoint an Appeal Board, composed of such number of members as he deems necessary from time to time to hear appeals under this section. The members of the Appeal Board shall be qualified and experienced attorneys, engineers, account-

ants, or persons possessing sufficient business experience or professional skill. He shall, without regard to the provisions of the civil-service laws and the Classification Act of 1923, appoint and fix the compensation and term of office of the members of the Appeal Board: *Provided,* That no member shall receive compensation at a rate in excess of $10,000 per annum nor be appointed for a term longer than two years.

(2) Panels of one or more members may act for the Appeal Board and shall sit from time to time in localities throughout the country, reasonably convenient for war contractors having proceedings before them. A panel of one member of the Appeal Board may hear any appeal whenever (i) the amount in controversy in the appeal is $25,000 or less; or (ii) the amount in controversy exceeds $25,000, but the war contractor taking the appeal fails to demand a panel of three members at the time of filing his appeal. If the war contractor is aggrieved by the decision of the Appeal Board or panel (other than an order remanding the case to the contracting agency under subsection (c) (3) (iii) of this section), then within ninety days after such decision he may bring suit on the claim or unsettled part thereof in accordance with subsection (b) (2) of this section. Such suit shall proceed as if no appeal had been taken under subsection (b) of this section. All costs of such suit shall be borne by the war contractor unless the court awards such contractor an amount in excess of that allowed by the Appeal Board or panel. Upon failure of the war contractor so to sue within such period, the decision of the Appeal Board or panel shall be final and conclusive.

(3) The Director or, if authorized by him, the Appeal Board shall prescribe the practice and procedure to govern proceedings for the Appeal Board. The Appeal Board or any panel thereof shall have power to administer oaths to witnesses and to compel by subpoena the attendance of witnesses, and the production of books, papers, documents, and other records. All provisions of law (including penalties and provisions relating to self-incrimination) applicable with respect to subpoenas is-

sued under the Federal Trade Commission Act shall be applicable with respect to subpoenas issued by the Appeal Board insofar as such provisions are not inconsistent with the provisions of this Act.

(e) The contracting agency responsible for settling any claim and the war contractor asserting the claim, by agreement, may submit all or any part of the termination claim to arbitration, without regard to the amount in dispute. Such arbitration proceedings shall be governed by the provisions of the United States Arbitration Act to the same extent as if authorized by an effective agreement in writing between the Government and the war contractor. Any such arbitration award shall be final and conclusive upon the United States to the same extent as a settlement under subsection (c) of section 6, but shall not be subject to approval by any settlement review board.

(f) Whenever any dispute exists between any war contractor and a subcontractor regarding any termination claim, either of them, by agreement with the other, may submit the dispute—

(1) to the Appeal Board in accordance with subsection (d) of this section; or

(2) to a contracting agency for mediation or arbitration whenever authorized by the agency or required by the Director.

Any award or decision in such proceedings shall be final and conclusive as to the parties so submitting any such dispute and shall not be questioned by the United States in settling any related claim, in the absence of fraud or collusion.

COURT OF CLAIMS

Sec. 14 "omitted."

PERSONAL FINANCIAL LIABILITY

Sec. 15 "omitted."

THE GENERAL ACCOUNTING OFFICE

Sec. 16 "omitted."

DEFECTIVE, INFORMAL, AND QUASI CONTRACTS

Sec. 17 "omitted."

RECORDS, FORMS, AND REPORTS

Sec. 18. (a) The Director shall establish policies for such supervision and review within the contracting agencies of termination settlements and interim financing as he deems necessary and appropriate to prevent and detect fraud and to assure uniformity in administration and to provide for expeditious settlements. For this purpose he shall prescribe (1) such records to be prepared by the contracting agencies and by war contractors as he deems necessary in connection with such settlements and interim financing; and (2) the records in connection therewith to be transmitted to the General Accounting Office. He shall seek to reduce the amount of record keeping, reporting, and accounting in connection with the settlement of termination claims and interim financing to the minimum compatible with the reasonable protection of the public interest. Each contracting agency shall prescribe forms for use by war contractors in connection with termination settlements and interim financing to the extent it deems necessary and feasible.

(b) The Director shall require the Government agencies performing functions under this Act to prepare such information and reports regarding terminations of war contracts, settlements of termination claims, and interim financing, as he deems necessary to assist him in appraising their operations or to assist him or other Government agencies in performing their functions under this Act, and may prescribe the terms and conditions upon which such information and reports shall be made available to other Government agencies. The Director may require any Government agency to furnish such information under its control as he deems necessary for the performance of his functions under this Act, but any such agency, in its discretion, may furnish any such information deemed by it to affect the national security only to the Director himself.

(c) The Director, by regulation, shall provide for making available to any interested Government agency such advance notice and other information on cut-backs in war production resulting from terminations or failures to renew or extend war contracts, as he deems necessary and appropriate.

(d) The Director shall make such investigations as he deems necessary or desirable in connection with termination settlements and interim financing. For this purpose he may utilize the facilities of any existing agencies and if he determines that the facilities of existing agencies are inadequate, he may establish a unit in the Office of Contract Settlement to supplement and facilitate the work of existing agencies. He shall report to the Department of Justice any information received by him indicating any fraudulent practices, for appropriate action.

(e) Whenever any contracting agency or the Director believes that any settlement was induced by fraud, the agency or Director shall report the facts to the Department of Justice. Thereupon, (1) the Department of Justice shall make an investigation to determine whether such settlement was induced by fraud, and (2) until the Department of Justice notifies the contracting agency that in its opinion the facts do not support the belief that the settlement was induced by fraud, the contracting agency, by set-off or otherwise, may withhold, from amounts owing to the war contractor by the United States under such settlement or otherwise, the amount of the settlement, or the portion thereof, which, in its opinion was affected by the fraud. In any such case the Department of Justice shall take such action as it deems appropriate to recovery payments made to such war contractor.

PRESERVATION OF RECORDS; PROSECUTION OF FRAUD

Sec. 19 (a) It shall be unlawful for any person willfully to secrete, mutilate, obliterate, or destroy, or cause to be secreted, mutilated, obliterated, or destroyed—

(i) any records of a war contractor relating to the negotiation, award, performance, payment, interim financing, cancelation or other termination, or settlement of a war contract of $25,000 or more; or

(ii) any records of a war contractor and any purchaser relating to any disposition of termination inventory in which the consideration received by any war contractor or any Government agency is $5,000 or more,

until (1) five years after such disposition of termination inventory by such war contractor or Government agency, or (2) five years after the final settlement of such war contract, or (3) five years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress, whichever applicable period is longer.

As used in this subsection, the term "records" includes, but is not limited to, books, ledgers, checks and check stubs, pay-roll data, vouchers, memoranda, correspondence, inspection reports and certificates. Any corporation violating any provision of this subsection shall be fined not more than $50,000 and any natural person violating any provision of this subsection shall be fined not more than $10,000, or imprisoned for not more than five years, or both: *Provided, however,* That the Director, by regulation, may authorize the destruction of such records upon such terms and conditions as he deems appropriate, which may include the making and retaining of photographs, microphotographs. Photographs or microphotographs of any records made in compliance with such regulations of the Director shall have the same force and effect as the originals thereof would have and shall be treated as originals for the purpose of admissibility in evidence.

(b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C. Supp. II, sec. 590a), is amended to read as follows:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

(c) (1) Every person who makes or causes to be made, or presents or causes to be presented to any officer, agent, or employee of any Government agency any claim, bill, receipt, voucher, statement, account, certificate, affidavit, or deposition, knowing the same to be false, fraudulent, or fictitious or knowing the same to contain or to be based on any false, fraudulent, or fictitious statement or entry, or who shall cover up or conceal any material fact, or who shall use or engage in any other fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any benefit, payment, compensation, allowance, loan, advance, or emolument from the United States or any Government agency in connection with the termination, cancelation, settlement, payment, negotiation, renegotiation, performance, procurement, or award of a contract with the United States or with any other person, and every person who enters into an agreement, combination, or conspiracy so to do,

(1) shall pay to the United States an amount equal to 25 per centum of any amount thereby sought to be wrongfully secured or obtained but not actually received, and (2) shall forfeit and refund any such benefit, payment, compensation, allowance, loan, advance, and emolument received as a result thereof and (3) shall in addition pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit.

(2) The several district courts of the United States, the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit, and such person or persons as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct.

(d) The provisions of section 35—A of the Criminal Code (18 U. S. C., sec. 80) shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

(e) It shall be unlawful for any person employed in any Government agency, including commissioned officers assigned to duty in such agency, during the period such person is engaged in such employment or service, to prosecute, or to act as counsel, attorney, or agent for prosecuting, any claim against the United States, or for any such person within two years after the time when such employment or service has ceased, to prosecute, or to act as counsel, attorney, or agent for prosecuting, any claim against the United States involving any subject matter directly connected with which such per-

son was so employed or performed duty. Any person violating any provision of this subsection shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

GENERAL PROVISIONS

Sec. 20. (a) Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this Act, (1) to make any contract necessary and appropriate to carry out the provisions of this Act; (2) to amend by agreement any existing contract, either before or after notice of its termination, on such terms and to such extent as it deems necessary and appropriate to carry out the provisions of this Act; and (3) in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement. This subsection shall not limit or affect in any way any authority or any contracting agency under the First War Powers Act, 1941, or under any other statute.

(b) Any contracting agency may prescribe the amount and kind of evidence required to identify any person as a war contractor, or any contract, agreement, or purchase order as a war contract for any of the purposes of this Act. Any determination so made that any person is a war contractor, or that any contract, agreement, or purchase order is a war contract, shall be final and conclusive for any of the purposes of this Act.

(c) There are hereby authorized to be appropriated such sums as may be necessary for administering the provisions of this Act.

(d) All policies and procedures relating to termination of war contracts, termination settlements, and interim financing, prescribed by the Director of War Mobilization or any contracting agency, in effect upon the effective date of this Act, and not inconsistent with this Act, shall remain in full force and effect unless and until superseded by the Director in accordance with

this Act, or by regulations of the contracting agency not inconsistent with this Act or the policies prescribed by the Director.

(e) Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid.

(f) Any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise, aid, and assist war contractors in preparing and presenting termination claims, in obtaining interim financing, and in related matters, to such extent as it deems desirable. Such advice, aid, or assistance shall not constitute a violation of section 109 of the Criminal Code (18 U. S. C. 198) or of any other law, provided the officer or employee does not receive therefor benefit or compensation of any kind, directly or indirectly from any war contractor.

(g) The Smaller War Plants Corporation is hereby directed—

(1) to disseminate information among small business concerns with respect to interim financing, termination settlements, removal and storage of termination inventories pursuant to the provisions of this Act and the regulations of the Director; and

(2) to assist small business concerns in connection with the securing of interim financing and the preparation of applications for such interim financing, the effecting of termination settlements, and the removal and storage of termination inventories, and to make interim loans and guaranties, in order to assure that small business concerns receive fair and equitable treatment from prime contractors and intermediate subcontractors in connection with the termination of war contracts.

OTHER FUNCTIONS OF THE DIRECTOR

Sec. 21 "omitted".

USE OF APPROPRIATED FUNDS

Sec. 22 "omitted".

DELEGATION OF AUTHORITY

Sec. 23. "omitted".

APPLICABILITY

Sec. 24 "omitted".

Sec. 25 "omitted".

SEPARABILITY OF PROVISIONS

Sec. 26 "omitted".

SHORT TITLE

Sec. 27. This Act may be cited as the "Contract Settlement Act of 1944".

Approved July 1, 1944.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 466

S. H. STEVENS AND E. L. STEVENS, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF SLEET-SHAVER MFG. CO., PETITIONER

v.

FEDERAL CARTRIDGE CORPORATION, A CORPORATION, DOING BUSINESS AS TWIN CITIES ORDNANCE PLANT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Supreme Court of Minnesota (R. 44) is reported at 38 N. W. 2d 154. This opinion rests on the authority of a former opinion reported at 226 Minn. 148, 32 N. W. 312.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on August 3, 1949 (R. 44). By order of Mr. Justice Clark on October 28,

1949, the time for filing a petition for a writ of certiorari was extended to and including December 1, 1949 (R. 46). The petition for a writ of certiorari was filed on November 25, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the state courts erred in declining to entertain the suit of the petitioner, a war contractor seeking termination damages, in the absence of a showing that the petitioner had submitted its claim for settlement under the Contract Settlement Act of 1944 (41 U.S.C. 101-125) and the regulations issued thereunder.[1]

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Contract Settlement Act of 1944, 58 Stat. 649, 41 U.S.C. 101-125, are set forth in Appendix A, *infra,* pp. 8-10. The pertinent provision of 32 C.F.R. (1944 Supp.) 8075.1 is set forth in Appendix B, *infra,* pp. 10-11.

STATEMENT

By complaint filed in the Minnesota District Court in Hennepin County, petitioner sought to

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[1] The petition (pp. 4, 8-10) also poses the question whether the Contract Settlement Act as interpreted by the Supreme Court of Minnesota is invalid under the due process clause of the Fifth Amendment. The question of constitutionality thus sought to be presented was neither raised nor considered in the courts below and is, accordingly, not available to petitioner herein. *Clark* v. *Williard,* 294 U.S. 211, 216; cf. *Blair* v. *Oesterlein Co.,* 275 U.S. 220, 225; *Duignan* v. *United States,* 274 U.S. 195, 200.

recover the sum of $41,769.96 allegedly due under a fixed price subcontract to recondition ammunition boxes (R. 1, 2; Pet. 3).[2] The subcontract had been terminated prior to completion (R. 8-9). In its answer, respondent, a prime contractor with the United States, alleged payment of the sum due under the contract, with the exception of $2,955.47 which had been tendered and was again tendered with the pleading (R. 11). Respondent further alleged that, although requested to do so, petitioner refused to prepare forms for the administrative settlement of its claim (R. 11), as provided by the Contract Settlement Act of 1944 (41 U.S.C. 101-125) and regulations thereunder, and contended that, accordingly, the court lacked jurisdiction over the action (R. 12).

Petitioner's demurrer to this defense was overruled (R. 16) and petitioner appealed to the Supreme Court of Minnesota. The court below held that, as plaintiff had not submitted his claim on the forms prescribed by the Act and regulations, the judgment of the trial court should be sustained (R. 24-37). On remand, petitioner elected not to amend its pleadings (R. 39). Respondent then moved for judgment on the pleadings (R. 38, 39). This motion was granted and judgment entered for respondent on May 13,

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[2] The sum sought in the complaint was reduced, in a subsequent pleading, to $17,264.56, petitioner admitting payment for some 93,080 boxes (R. 13, 14, 15). Petitioner then added a claim for $24,505.40 for loss of anticipated profits (R. 15-16).

1949 (R. 39, 40). A petition for rehearing was denied on May 26, 1948 (R. 38), and the Supreme Court for Minnesota affirmed the judgment on August 3, 1949, on the basis of its former opinion (R. 44).

ARGUMENT

1. The question whether petitioner had a right to sue respondent without first pursuing the available administrative remedies does not merit review by this Court. In so far as we can ascertain, the facts of the case are unique. In sharp contrast is the action taken by substantially all other war contractors in connection with termination claims. War contractors, both prime contractors and subcontractors, have universally accepted and utilized the administrative machinery provided by the Contract Settlement Act of 1944 and regulations issued thereunder, with the result that the vast problem of settlement of termination claims is now substantially completed.[3] The basic Congressional objective in passing the Act, the speedy settlement of such claims, has been fully attained by the use of administrative settlement pro-

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[3] Contract Terminations and Settlements, Twenty First Report of the General Services Administration to The Congress, October, 1949, p. 1. Of 320,005 contracts terminated from the beginning of war production to September 30, 1949, only 252 were pending settlement as of September 30, while 319,758 were settled. In percentage figures, 99.9% were settled while .1% were pending settlement. Of 66 billions of cancelled commitments, 65.6 billions were settled as of June 30, 1949 while only .5 billion were pending settlement, or .7%.

cedures.[4] This fact alone suggests the inappropriateness of certiorari.

2. The challenged holding of the court below, that there was no jurisdiction to entertain petitioner's suit for claimed termination damages since the suit was prematurely brought, rests upon two grounds. Primarily, the court below gave recognition to the broad purpose of Congress in providing administrative procedures for the consideration and speedy settlement of the termination claims of all war contractors (R. 30).[5] This recognition was derived from a detailed examination of the provisions of the Act, regulations issued thereunder, and other legislative materials (R. 31-35). The court below concluded that a fair reading of these materials in light of the congressional purpose indicated an intention that subcontractors submit termination claims for administrative consideration as a condition precedent to the right to enforce damage claims by litigation (R. 37).[6] In addition, the court

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[4] Contract Settlement Act of 1944, § 1(a), (b), 41 U.S.C. 101 (a), (b), Appendix A, *infra*, p. 8; S. Rept. 836, 78th Cong., 2d sess., p. 1; H. Rept. 1590, 78th Cong., 2d sess., pp. 18, 19.

[5] The term "war contractor" is defined in the Contract Settlement Act of 1944 to include subcontractors. Section 3(c), 41 U.S.C. 103 (c).

[6] The provisions so examined were apparently considered by the court below sufficient to overcome contrary implications which might be drawn from certain excerpts from the legislative materials. In this connection, particular reference might be made to petitioner's reliance on 10 C.F.R. (1944 Supp.) 846.625-1 (Pet. 10). While this section recognizes

below also found a specific and more narrow basis of decision in the regulation (32 C.F.R. (1944 Supp.) 8075.1) which required subcontractors, as well as prime contractors, to prepare and submit terminations claims on prescribed standard forms (R. 31-32).[7] The claims thus prepared were, in the case of subcontractors, to be submitted to prime contractors.

In essence, the court below held that petitioner's suit was premature until it had afforded to the United States a reasonable opportunity, directly or indirectly, to examine the claim for the purpose of administrative settlement and to determine whether settlement by agreement could not be reached. The holding is, of course, in accord with the general principles repeatedly applied in

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that judgments may be obtained by subcontractors against prime contractors, it is our view that this recognition is given solely for the purpose of settlement between the United States and the prime contractor. The section does not preclude the interpretation given by the court below to the standard form requirement (R. 31-32), namely, that the submission of a claim by a subcontractor was a condition precedent to the right to sue. Reference may also here be made to petitioner's reliance on certain statements made in the decision of the Board of Contract Appeals in *Precision Metal & Machine Co.* v. *War Department*, 3 C.C.F. 1001. That decision merely held that a subcontractor was not entitled to invoke the various review steps provided by the Act in a case in which the United States had declined to entertain the responsibility for settling the termination claim. Unlike petitioner's position in the present case, the subcontractor in the *Precision Metal* case had submitted a claim for settlement.

[7] It should be noted that petitioner conceded, in the court below, the validity of an exercise of congressional power thus to cover subcontractors under Contract Settlement Act procedure (R. 27).

decisions of this Court dealing with suits prematurely brought. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41; *Macauley* v. *Waterman S. S. Corp.*, 327 U.S. 540; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Lichter* v. *United States*, 334 U.S. 782, 789-793. And it is important to note, in assessing the need for the issuance of a writ of certiorari in this case, that the decision of the court below does not finally and definitively dispose of petitioner's claim. Petitioner still has the right to submit its claim for settlement and can, after invoking the administrative procedure, resort to further litigation if necessary.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

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DECEMBER, 1949.

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[8] The Minnesota Statute of Limitations on contract actions is six years. Minnesota Statutes Annotated, section 541.05. The termination notice in this case was given in October, 1944 (R. 8), and petitioner, accordingly, has until October, 1950, in which to bring a proper suit in the state court.

APPENDIX A

The pertinent sections of the Contract Settlement Act, 1944, 58 Stat. 649, 41 U. S. C. 101-125, provide as follows:

SECTION 1. The Congress declares that the objectives of this Act are—

(a) to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit;

(b) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts, and adequate interim financing until such final settlement;

(c) to assure uniformity among Government agencies in basic policies and administration with respect to such termination settlements and interim financing;

(d) to facilitate the efficient use of materials, manpower, and facilities for war and civilian purposes by providing prime contractors and subcontractors with notice of termination of their war contracts as far in advance of the cessation of work thereunder as is feasible and consistent with the national security;

(e) to assure the expeditious removal from the plants of prime contractors and subcontractors of termination inventory not to be retained or sold by the contractor;

(f) to use all practicable methods compatible with the foregoing objectives to prevent improper payments and to detect and prosecute fraud. * * *

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SEC. 3. As used in this Act—

* * * * *

(c) The term "war contract" means a prime contract or a subcontract; and the term "war contractor" means any holder of one or more war contracts.

* * * * *

SEC. 4. * * *

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(b) In order to insure uniform and efficient administration of the provisions of this Act, the Secretary of the Treasury, subject to such provisions, by general orders or general regulations—

(1) shall prescribe policies, principles, methods, procedures, and standards to govern the exercise of the authority and discretion and the performance of the duties and functions of all Government agencies under this Act; and

(2) may require or restrict the exercise of any such authority and discretion, or the performance of any such duty or function, to such extent as he deems necessary to carry out the provisions of this Act.

(c) The exercise of any authority or discretion and the performance of any duty

or function, conferred or imposed on any Government agency by this Act, shall be subject to such orders and regulations prescribed by the Secretary of the Treasury pursuant to subsection (b) of this section. Each Government agency shall carry out such orders and regulations of the Secretary of the Treasury expeditiously, and shall issue such regulations with respect to its operations and procedures as may be necessary to carry out the policies, principles, methods, procedures, and standards prescribed by the Secretary of the Treasury. Any Government agency may issue such further regulations not inconsistent with the general orders or regulations of the Secretary of the Treasury as it deems necessary or desirable to carry out the provisions of this Act.

* * * * *

APPENDIX B

The pertinent section of 32 C.F.R. (1944 Supp.) 8075.1 provides as follows:

§ 8075.1 *Settlement proposal forms.* The attached forms, designated thereon Office of Contract Settlement Forms 1, 1a, 1b, 2a, 2b, 2c, 2d, and 3, are prescribed for use by all government agencies in connection with the settlement of claims under terminated fixed-price war supply contracts in accordance with the following "Instructions for use of

Standard Contract Settlement Proposal Forms":

Instructions for Use of Standard Contract Settlement Proposal Forms

General

October 1, 1944.

1. *Standard Forms provided.* The Standard Forms are prescribed by the Director of Contract Settlement under the Contract Settlement Act of 1944. They are required to be used by all prime contractors and subcontractors in submitting proposals for settlement of claims under terminated fixed-price war supply contracts. This includes fixed-price supply subcontracts underlying cost-plus-fixed-fee prime contracts or subcontracts. The forms should be used by prime contractors for filing with the Government, and by subcontractors for filing with the company from which the notice of termination was received. * * *

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